No. 12,425

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WALTER L. PENDERS and FLORA PENDERS,
Appellees.

APPELLANT'S REPLY BRIEF.

FRANK J. HENNESSY,
United States Attorney,
Post Office Building, San Francisco 1, California,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

Texts

No. 12,425

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WALTER L. PENDERS and FLORA PENDERS,
Appellees.

APPELLANT'S REPLY BRIEF.

I.

FOREWORD.

The "Brief for Appellee" filed in this appeal may be regarded as advancing only two principal contentions:

(1) The Appellate Court has no authority to review findings of fact made by the trial Court. This assertion refers particularly to the trial Court's findings of Appellant's negligence and Appellee's freedom from negligence. (Brief for Appellee, page 9, third paragraph, and pages 6 and 18, *et seq.)*

(2) The damages awarded by the trial Court were not excessive. (Brief for Appellee, page 20.)

We shall discuss these two contentions in the above order.

II.

ARGUMENT.

(1) THE APPELLATE COURT HAS AUTHORITY TO REVIEW FINDINGS WHICH ARE CONTRARY TO THE PHYSICAL FACTS ESTABLISHED BY THE EVIDENCE.

Appellee contends repeatedly throughout his brief that only the trial Court can determine the facts as established by the evidence produced at the trial. Appellee's contention in this respect is based upon the well recognized rule that only the trial Court can judge the credibility of *oral* testimony. We do not dispute the soundness of this rule. We respectfully submit, however, that it is inapplicable to evidence of physical facts, evidence which in this case does not depend on oral testimony and evidence which is directly available to the Honorable Appellate Court.

The Appellee's entire argument proceeds upon the assumption that the principal question raised upon this appeal is whether this Appellate Court is free to reverse the trial Court's findings of fact, which are supported by certain *oral* testimony, although contradicted by other *oral* testimony. This assumption disregards completely the entire burden of Appellant's argument, which is that *physical facts* which contradict oral testimony, compel an Appellate Court to reverse conclusions of law by a trial Court which has disregarded the undisputed physical facts before it. In this case the trial Court ignored completely the undisputed physical facts shown to exist in this case by Plaintiff's Exhibits 17, 18, 19 and 20, being photographs of the physical damage resulting from the ac-

cident in suit. These photographs, as original exhibits transmitted by the trial Court to the appeal Court, are now before the Appellate Court. There can be no question of the credibility of oral testimony involved in a consideration of the physical facts embodied in these photographs. The Appellate Court is legally just as capable as the trial Court to interpret these photographs. We submit these photographs clearly and conclusively establish that contrary to the findings and conclusions of the trial Court the Appellant was not negligent and the Appellee was negligent in this accident.

It is well established that the Federal Appellate tribunal has "untrammeled power to interpret written documents".

> *Eddy v. Prudence Bonds Corp.,* 2 C., 1947, 165 F. (2d) 157 at 163 (opinion by L. Hand, J.), certiorari denied 33 U.S. 845.

In the instant appeal the Honorable Appellate Court has the same untrammeled power to interpret the undisputed documentary evidence embodied in the photographs in evidence as Plaintiff's Exhibits 17 to 20 inclusive. These photographs were admitted in evidence without objection and were never disputed as truly representing physical facts in this collision. (Tr. p. 81.) Moreover, the Honorable Appellate Court, contrary to the Appellee's view (Brief for Appellee, p. 10), in the instant appeal, is in no way bound by the trial Court's conclusions of law regarding negligence. As pointed out in

> *Johnson v. U.S.,* 2 C., 1948, 168 F. (2d) 886,

II.

ARGUMENT.

(1) THE APPELLATE COURT HAS AUTHORITY TO REVIEW FINDINGS WHICH ARE CONTRARY TO THE PHYSICAL FACTS ESTABLISHED BY THE EVIDENCE.

Appellee contends repeatedly throughout his brief that only the trial Court can determine the facts as established by the evidence produced at the trial. Appellee's contention in this respect is based upon the well recognized rule that only the trial Court can judge the credibility of *oral* testimony. We do not dispute the soundness of this rule. We respectfully submit, however, that it is inapplicable to evidence of physical facts, evidence which in this case does not depend on oral testimony and evidence which is directly available to the Honorable Appellate Court.

The Appellee's entire argument proceeds upon the assumption that the principal question raised upon this appeal is whether this Appellate Court is free to reverse the trial Court's findings of fact, which are supported by certain *oral* testimony, although contradicted by other *oral* testimony. This assumption disregards completely the entire burden of Appellant's argument, which is that *physical facts* which contradict oral testimony, compel an Appellate Court to reverse conclusions of law by a trial Court which has disregarded the undisputed physical facts before it. In this case the trial Court ignored completely the undisputed physical facts shown to exist in this case by Plaintiff's Exhibits 17, 18, 19 and 20, being photographs of the physical damage resulting from the ac-

cident in suit. These photographs, as original exhibits transmitted by the trial Court to the appeal Court, are now before the Appellate Court. There can be no question of the credibility of oral testimony involved in a consideration of the physical facts embodied in these photographs. The Appellate Court is legally just as capable as the trial Court to interpret these photographs. We submit these photographs clearly and conclusively establish that contrary to the findings and conclusions of the trial Court the Appellant was not negligent and the Appellee was negligent in this accident.

It is well established that the Federal Appellate tribunal has "untrammeled power to interpret written documents".

> *Eddy v. Prudence Bonds Corp.,* 2 C., 1947, 165 F. (2d) 157 at 163 (opinion by L. Hand, J.), certiorari denied 33 U.S. 845.

In the instant appeal the Honorable Appellate Court has the same untrammeled power to interpret the undisputed documentary evidence embodied in the photographs in evidence as Plaintiff's Exhibits 17 to 20 inclusive. These photographs were admitted in evidence without objection and were never disputed as truly representing physical facts in this collision. (Tr. p. 81.) Moreover, the Honorable Appellate Court, contrary to the Appellee's view (Brief for Appellee, p. 10), in the instant appeal, is in no way bound by the trial Court's conclusions of law regarding negligence. As pointed out in

> *Johnson v. U.S.,* 2 C., 1948, 168 F. (2d) 886,

a Federal Tort Claims Act decision, in a negligence action tried to the Court whether facts found show negligence, presents a question of law in respect to which the reviewing Court is not bound by the trial Court's conclusions, though, of course, the latter's conclusions may be persuasive in the absence of their being clearly erroneous.

Appellant respectfully submits that in this appeal the trial Court's conclusions of law that Appellant was negligent and that Appellee was *not* guilty of contributory negligence, are clearly erroneous in view of the undisputed physical facts evidenced by Plaintiff's Exhibits 17, 18, 19 and 20. Because these exhibits picture the physical facts of a head-on collision, they contradict the oral testimony of Appellee's witnesses that Appellee was completing a legal and proper lefthand turn when struck by Appellant. (Brief for Appellee, pp. 18 to 20, inc.) In the face of these physical facts contradicting Appellee's oral testimony, this Honorable Appellate Court has no choice but to disregard the oral testimony.

Numerous decisions of the State and Federal Appellate Courts have recognized the rule that physical facts contradicting oral testimony shall prevail. See, among the State decisions:

Borcth v. Kisselman, 1929, 7 New Jersey Misc. 922, 146 A. 683,

(involved photographs showing physical facts contrary to oral testimony.)

Federal decisions supporting Appellant's position include:

F. W. Woolworth v. Davis, 10 C., 1930, 41 F. (2d) 342 at 347,

an elevator accident case wherein plaintiff's theory of accident was contradicted by physical facts. The Court ruled that oral testimony contradicted by physical facts cannot be credited by Court or jury.

Chambers v. Skelly Oil, 10 C., 1937, 87 F. (2d) 853, especially 856,

a vehicle accident case in which photographs established physical facts contrary to oral testimony.

Bash v. B. & O. R. Co., 3 C., 1939, 102 F. (2d) 48,

a railroad crossing case in which plaintiff was denied recovery despite favorable oral testimony because physical facts made plaintiff's theory untenable.

An interesting review of this "incontrovertible physical facts rule" is set forth in dissent of Miller, J., in

Baltimore & O. R. v. Postom, U.S.C.A. District of Columbia, 1949, 177 F. (2d) 53, commencing at 59.

Although the *B. & O. v. Postom* factual situation is very different from the case at bar, Judge Miller's dissent is valuable for its comprehensive analysis of the physical facts doctrine and fulsome citation of decisions applying the doctrine.

ferring to him as "advanced in years". *(Ibid.)* Nowhere, however, does Appellee's obviously low life expectancy enter into the calculation of damages which Appellee contends are not excessive.

It is equally true that Appellee omits any reference to his deceased wife's low life expectancy in his contention that damages arising from her death are not excessive. (Brief for Appellee, p. 21.)

It is respectfully submitted that as well as all of the factors pointed out in Appellant's Opening Brief as indicating excessive damages in this case, the damages here awarded cannot be allowed because they are irreconcilable with the obviously low life expectancy of Appellee and his deceased wife. Life expectancy, together with a plaintiff's gainful employment record, are unquestionably factors to be considered in assessing damages, according to decisions of this Court. It is Appellant's opinion that the trial Court's failure to consider either the life expectancy or employment record of Appellee constitutes reversible error.

Since Appellee evidently places great reliance upon this Honorable Court's decision in

Guthrie v. Southern Pacific, 9 C., 1949, 180 F. (2d) 295,

we shall confine ourselves to a discussion of this decision. Analysis of the *Guthrie* case readily discloses how widely separated it is from the case at bar. At the outset the *Guthrie* case involved a verdict—not, as here, a Court award of damages. Moreover, the *Guthrie* case involved violent, disabling and perma-

nent injuries to a 59-year-old man, while the instant case deals with injuries of slight extent, which cannot be regarded as seriously disabling to the octogenarian Appellee. We ask the Honorable Court to compare the excruciating "phantom pain" of Guthrie plaintiff amputee (supra 303, *et seq.*) with Appellee's deformed wrist (Tr. p. 51) and painful knee joint. (Tr. p. 53, 54.)

Entirely apart from the patently great physical differences between the plaintiff in the *Guthrie* case and the Appellee, it is at once apparent that from a legal standpoint the *Guthrie* decision is firmly based upon the very two factors which the trial Court in the case at bar omitted entirely, namely, life expectancy and impaired earning capacity. The *Guthrie* opinion expressly refers to the plaintiff therein as having a life expectancy of eleven years and an established earning capacity of nearly $6000 a year. (Supra, at 302.) In the instant case no showing whatsoever was made of the life expectancy of either Appellee or his deceased wife, nor was there any showing of Appellee's expected loss of earnings.

In the case of life expectancy we must conclude that no evidence was offered because Appellee and his deceased wife had, from the standpoint of damages, embarrassingly low life expectancies. Appellee, aged seventy-nine at time of injury (Tr. p. 71), had a life expectancy of 5.38 years, while his deceased wife, at that time seventy-seven years old *(Ibid.),* could reasonably expect to live only 6.07 years. (Commissioner's

Standard Ordinary Mortality Table, 58 *Corpus Juris Secundum* 1212.)

On the score of loss of earnings, it appears plain that Appellee suffered no damage and therefore presented no evidence of lost earnings, because he was retired. (Appellant's Opening Brief, p. 31.)

In summary, we conclude that applying the *Guthrie* case analysis to the case at bar, Appellee's recovery in the trial Court was excessive, as a matter of law, in view of his low life expectancy as well as that of his deceased wife, and in view of his failure to show any impaired earning power resulting from the accident.

In fairness to the opinion of Judge Pope, Appellant deems it appropriate to point out, as this Honorable Appellate Court well knows, that the *Guthrie* decision was *not* unanimous. Appellee's quotation from Judge Pope (Brief for Appellee, p. 23) overlooks the forceful criticism by Judge Pope of the "doctrine of impotence" followed by some Federal Appellate Courts in reviewing questions of excessive damages (supra at 306). We concur heartily with Judge Pope's dissenting criticism and would urge this Honorable Appellate Court to assert the power of review asserted by it in

Cobb v. Lepisto, 9 C., 1925, 6 F. (2d) 128

and

Dept. of Water & Power of Los Angeles v. Anderson, 9 C., 1938, 95 F. (2d) 577.

III.

CONCLUSION.

For the foregoing reasons, Appellant earnestly requests that the Honorable Appellate Court reverse the judgment of the trial Court herein.

Dated, San Francisco, California,
May 12, 1950.

Respectfully submitted,
FRANK J. HENNESSY,
United States Attorney,
Attorney for Appellant.